Teh Chin Chuan & Anor v Chuan Hong Co & Ors

HIGH COURT (PULAU PINANG) — WINDING-UP PETITION NO 26–1 OF 1998
ABDUL HAMID MOHAMAD J
10 MARCH 1999

Companies and Corporations — *Winding up — Petition — Presentation of petition under s 181 after filing of a s 218 petition — Whether filing of petition under s 181 allowed — Multiplicity of proceedings — Whether both petitions can be heard together*

The petitioners filed a petition under s 181 ('the originating petition') of the Companies Act 1965 ('the Act') on 23 January 1998. Prior to that, they had also filed a petition under s 218(1)(b), (e), (f) and (i) of the Act ('the winding-up petition'). That winding-up petition was still pending. The respondents filed a summons in chambers ('encl 6') in the originating petition praying for the petition to be struck out on the ground that the same was frivolous, vexatious and an abuse of process of court. The petitioners filed a summons in chambers ('encl 10') praying for an order that the winding-up petition be heard together with the originating petition. The issue raised by the respondents in encl 6 was whether the presentation of the originating petition has resulted in a multiplicity of proceeding in view of the existing winding-up petition. The issue raised in encl 10 was that it would not be practical to have both petitions heard together since they are governed by two different sets of rules.

Held, dismissing encl 6 and allowing encl 10:

(1) There is nothing in the Act to say that a petitioner can only resort to either one of the remedies (see p 462H). It must also be noted that the originating petition which was filed subsequently was also based on fresh evidence. Therefore, the filing of the originating petition could not be said to be a multiplicity of proceeding and/or an abuse of the process of court (see p 463E).

(2) In the two petitions, the facts were bound to overlap, though not all. It would save time and costs to have the two heard together. The respondents would not be prejudiced in any way (see p 464A–B).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memfailkan satu petisyen ('petisyen pemula tersebut') di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') pada 23 Januari 1998. Sebelum itu, mereka juga telah memfailkan satu petisyen di bawah s 218(1)(b), (e), (f) dan (i) Akta tersebut ('petisyen penggulungan tersebut'). Petisyen penggulungan tersebut masih belum selesai. Penentang-penentang telah memfailkan satu saman dalam kamar ('lampiran 6') di dalam petisyen pemula tersebut memohon agar petisyen tersebut ditolak atas alasan bahawa ia adalah

remeh, menyusahkan dan menyalahgunakan proses mahkamah. Pempetisyen-pempetisyen telah memfailkan satu saman dalam kamar ('lampiran 10') memohon satu perintah bahawa petisyen penggulungan tersebut didengar bersama dengan petisyen pemula tersebut. Isu yang ditimbulkan oleh penentang-penentang di dalam lampiran 6 adalah sama ada pembentangan petisyen pemula tersebut telah menyebabkan kepelbagaian prosiding memandangkan telah terdapat petisyen penggulungan tersebut. Isu yang ditimbulkan di dalam lampiran 10 ialah adalah tidak praktikal untuk mendengar kedua-dua petisyen serentak kerana masing-masing mempunyai set aturan tersendiri.

Diputuskan, menolak lampiran 6 dan membenarkan lampiran 10:

(1) Tiada apa-apa di dalam Akta tersebut yang menyatakan bahawa pempetisyen hanya boleh menggunakan salah satu daripada remedi yang ada (lihat ms 462H). Ia mesti diambil ingat bahawa petisyen pemula tersebut yang difailkan terkemudian adalah berdasarkan bukti-bukti baru. Oleh itu, pemfailan petisyen pemula tersebsut tidak boleh dikatakan sebagai kepelbagaian prosiding dan/atau penyalahgunaan proses mahkamah (lihat ms 463E).

(2) Di dalam kedua-dua petisyen, fakta-fakta akan bersangkut paut, walaupun bukan semua. Adalah menjimatkan masa dan kos jika kedua-duanya didengar serentak. Penentang-penentang tidak akan mengalami sebarang mudarat (lihat ms 464A–B).

Notes

For cases on petitions in winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 518–535.

Cases referred to

Lynn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor [1997] 4 MLJ 198 (refd)

Ebrahimi v Westhourne Galleries Ltd [1973] 3 AC 360 (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors [1994] 2 MLJ 789 (refd)

Kumagai-Zenecon Construction Pte Ltd, Re; Kumagai Gumi Co Ltd v Kumagai-Zenecon Construction Pte Ltd & Ors [1994] 3 SLR 552 (refd)

Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218(1)(b), (e), (f), (i)

Karin Lim Ai Ching (*Presgrave & Mathew*) for the petitioners.
Ooi Teik Hoe and *Saw Lip Khai* (*Ooi Lee & Co*) for the respondents.

Abdul Hamid Mohamad J: This petition was filed on 23 January 1998 under s 181 of the Companies Act 1965. The two petitioners are shareholders of the company, the first respondent. The petitioners allege that the directors:

(a) have acted in the affairs of the company in their own interests rather than in the interests, of the members as a whole and exercised directors powers in a manner which is unfair, unjust and oppressive to [the] petitioners;

(b) have acted in breach of directors' fiduciary duties;

(c) have acted in a manner which have eroded the object for which the company was set up for; and

(d) have acted unfairly, prejudicially, in bad faith and lack of probity in abuse of directors powers and in total disregard of your petitioners interests justifying the loss of trust and confidence by your petitioners in the directors;

They prayed for:

59. 1 A declaration that in acting in the manner as aforesaid:

(a) the directors in acting in the manner as aforesaid, are conducting the affairs of the company or exercising their powers as directors of the company in a manner that is oppressive to the members of the company including the petitioners and/or in disregard of the interests of the members of the company including the petitioners; and/or

(b) did and/or has done some act of the company and/or are threatened and/or resolutions have been passed which have and/or will unfairly discriminate against or is and/or is otherwise prejudicial to members of the company including your petitioners; and

59.2 that the directors be ordered to account for profits to the company in respect of profits made in breach of their fiduciary duties as directors of the company including but not limited to the sale of Bensonlauch Sdn Bhd. Shares by the directors; and

59.3 that the directors be ordered to purchase and the petitioners do sell their shares to the directors at the market value of the said shares to be determined by an independent auditor approved by this High Court; or

59.4 that the company would be wound up pursuant to s 181 of the Companies Act 1965;

59.5 Such other reliefs as the court may think fit to grant;

59.6 An order that the directors, the second, third, fourth and fifth respondents do pay all the costs of this petition incurred by the petitioners and all the cost if any incurred by the first respondent.

Prior to that, on 4 September 1996 the same petitioners had filed a winding-up petition under s 218(1)(b), (e), (f) and (i) of the Act (Winding-Up Petition No 28–38–96). That winding-up petition is still pending in Court No 2, also in Penang.

On 4 August 1998, the first respondent filed a summons in chamber (encl 6) in this petition praying, inter alia, for an order:

(a) that the petition filed herein be struck out on the ground that the same is frivolous, vexatious and an abuse of process of court.

On 22 September 1998, the petitioners filed a summons in chamber (encl 10) praying for an order that the Winding-Up Petition No 28-38-96 be heard together with this petition.

On 13 November 1998 I dismissed encl 6 but allowed encl 10 to the effect that this petition be heard together with Petition No 28-38-96 which was filed earlier in Court No 2. The respondents appealed to the Court of Appeal. Hence this grounds of judgment.

Enclosure 6

As learned counsel for the respondent/applicant in encl 6 puts it, the sole issue before the court is whether the presentation of this originating petition has resulted in a multiplicity of proceedings in view of the existing winding-up petition. He argued that to allow a s 181 petition to be presented with a s 218 winding-up petition is tantamount to a rolling up of both petitions under one petition.

Learned counsel for the petitioners submitted that the petitioners are not prohibited by law to take advantage of the provisions of both ss 181 and 218. However, that cannot be done in one proceeding. That is why two proceedings were filed.

The first question is whether it is a duplicity of proceedings and/or an abuse of the process of the court for a petitioner to file a winding-up petition under s 218 of the Companies Act 1965 and also an originating petition under s 181 of the Act.

The Act provides two separate remedies, one under s 218 and the other under s 181. The remedies provided by s 181 are wider than that provided by s 218. Under s 218, the court may only make a winding-up order. On the other hand, under s 181, the court can make other orders even though, presumably as a last resort, an order to wind up the company.

The grounds for a petition under s 218 are wider than those under s 181. Under s 181, the grounds refer to what we may call 'internal problems', problems relating to the manner in which the company is managed. Under s 218, even though a few of the grounds overlap with the grounds under s 181, there are many other grounds involving outsiders, eg creditors, the Registrar of Companies, Bank Negara Malaysia and others.

There is nothing in the Act to say that a petitioner can only resort to either one of the remedies. In *The Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor* [1997] 4 MLJ 198, in which the issue of multiplicity of actions and abuse of the process of the court also arose, Kamalanathan Ratnam JC (as he then was) said that a petitioner had every right to present the petitions separately under ss 181 and 218 of the Act respectively and that the respondent (in that case) had failed to establish a clear cut case to warrant striking off the petitions. The learned judicial commissioner (as he then was) followed *Ebrahimi v Westhourne Galleries Ltd* [1973] 3 AC 360 and *Lai Kim Loi v Dato Lai Fook Kim* [1989] 2 MLJ 290.

Referring to *Lai Kim Loi v Dato Lai Fook Kim & Anor*, the learned judicial commissioner (as he then was) had this to say:

> I find that in *Lai Kim Loi v Dato Lai Fook Kim & Anor*, the petitioner therein had proceeded to 'roll a s 181 and a s 218 petition' in one petition but preferred to intitule it as a winding-up petition. The Supreme Court held that the petition was defective as different sets of rules applied to s 181 and 218 petitions respectively. The Supreme Court did not at any point of time expressly state that a petitioner had no right to present two separate petitions under ss 181 and 218 of the Act respectively. It is my view that a petition pursuant to s 218(1)(i) is justified in a quasi-partnership type scenario and as such would not be applicable to just any type of company sought to be wound up (see *Ebrahimi v Westbourne Galleries Ltd*). I find that s 218(1)(i) is clearly applicable to the present scenario in that there is in existence a 'quasi-partnership' type situation wherein there are only two parties involved, that is the petitioner and the second respondent both of whom agreed to form the first respondent. On the authority of *Lai Kim Loi v Dato Lai Fook Kim & Anor*, I am of the view that the petitioner has every right to present the petitions separately under ss 181 and 218 of the Act respectively and that the respondents have failed to establish a clear cut case to warrant a striking off of those petitions.

I agree with his analysis of *Lai Kim Loi* and it is because of *Lai Kim Loi* that the petitioners in the present petition have no choice but to file the two petitions separately.

It should also be noted that the originating petition which was filed subsequently, is also based on fresh facts, unlike in *Lyn Country Sdn Bhd* where both petitions were based on the same facts. So, the filing of the originating petition cannot be said to be a multiplicity of proceeding and/or an abuse of the process of the court.

It was also argued that the presentation of the originating petition after the winding-up petition was filed was done mala fide. All I need to say is that the allegation is not substantiated.

On these grounds I dismissed encl 6 with costs.

Enclosure 10

Enclosure 10 is an application by the petitioner for the two petitions to be heard together.

The first argument put forward by learned counsel for the respondent was that it would not be practical to have them heard together. This is because they are governed by two different sets of rules, the winding-up petition by the Winding-Up Rules 1972, and the Originating Petition by the Rules of the High Court 1980.

Re Kumagai-Zenecon Construction Pte Ltd; Kumagai Gumi Co Ltd v Kumagai-Zenecon Construction Pte Ltd & Ors [1994] 3 SLR 552 is a good example where two petitions being heard together. The fact that a different set of rules applies to the respective petition does not appear to have prevented the learned judge coming to his decisions. Finally, he made orders under the originating petition and made no order under the winding-up petition. The same may well happen here.

In *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789, the court allowed a winding-up petition under s 218 and an

originating petition under s 181 to be heard together.

So, that is not something new both in Malaysia and Singapore.

In these two petitions, the facts are bound to overlap, though not all. It will save time and costs to have the two heard together. I do not think the respondent will be prejudiced in any way. Therefore I allowed the application and as the winding-up petition was filed earlier in time, I ordered that this originating petition be heard together with the winding-up petition. I made no order as to costs.

Enclosure 6 dismissed. Enclosure 10 allowed.

Reported by Zahid Taib